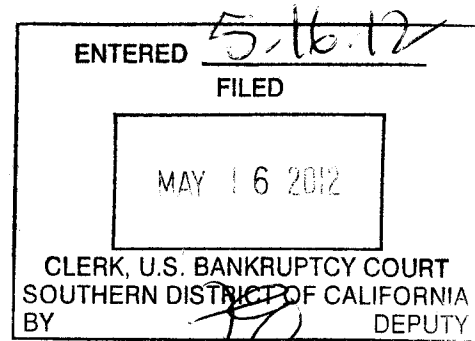


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



11 **UNITED STATES BANKRUPTCY COURT**

12 **SOUTHERN DISTRICT OF CALIFORNIA**

11 In re:

12 Ahmad Alkayali and Terri Lyn Stiles

13 Alkayali,

14 Debtors.

Bankruptcy No. 11-11082-LT7

Adversary No. 11-90464-LT

15 Neocell Corporation,

16 Plaintiff,

17 v.

18 Ahmad Alkayali

19 Defendant,

20 Counterclaimant

MEMORANDUM DECISION

21 v.

22 Neocell Corporation, a California

23 corporation, Akram Quadri, an individual,

24 Fatma Boukhari, an individual, Sarah

25 Quadri, an individual, Steven Smith, an

26 individual, John Clifford, an individual,

27 Mark Kearney, an individual, Jonas

28 Williams, an individual, and Smith

Counter-Defendants.

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1 **FACTS**

2 The facts as set forth in Movant's motions are not disputed. On June 7, 2011,
3 NeoCell Corporation ("NeoCell") obtained a federal court judgment against the Debtor for
4 \$49,544.50 based on Debtor's breach of fiduciary duties, breach of contract, and fraud (the
5 "Liability Judgment"). The Liability Judgment was the final result of multiple state court
6 and federal court complaints, cross-complaints, and appeals spanning eleven years of
7 litigation.³ On September 21, 2011, the district court also awarded NeoCell \$347,835.00 in
8 attorneys' fees⁴ against Debtor's company (the "Fee Judgment") (the Liability Judgment and
9 the Fee Judgment are referred to herein, collectively, as the "Judgment").

10 On June 30, 2011, Debtor filed a bankruptcy petition. On October 3, 2011, NeoCell
11 initiated an adversary proceeding seeking a determination that the Judgment was not
12 dischargeable. On December 12, 2011, Debtor filed an "amended"⁵ reply asserting what he
13 termed counterclaims against NeoCell, the Movants – the three attorneys representing
14 NeoCell in the federal court case and their firm – and others. Debtor's counterclaims
15 alleged that the counter-defendants abused judicial process, committed fraud, and
16 committed civil conspiracy by submitting false accusations and declarations against the
17 Debtor in the federal court action.

18 On January 11, 2012, the Movants filed their motion to dismiss the counterclaims
19 and their motion to strike the counterclaims as SLAPP suits under C.C.P. § 425.16. The
20 Debtor filed no opposition and, thereby, conceded the merits of both motions.

21 On February 9, 2012, the Court granted the motion to dismiss all counterclaims
22 against the Movants for lack of standing. The Court's Tentative Ruling (Dkt. #40),
23 however, also provided that the Movants established that there was a high probability that
24 they would prevail on the merits of the Motion to Strike. And in its Tentative, the Court

25 _____
26 ³ See Movants' Motion to Strike, Docket 29, pp. 2-3 (for a list of cases and results).

27 ⁴ Movant's complaint acknowledges that Debtor's bankruptcy case stayed Movant's pursuit of
the Fee Judgment against Debtor personally.

28 ⁵ Debtor misfiled his original answer as an amended reply.

1 also noted that the conduct complained of in the amended reply fit well within the conduct
2 protected by California's anti-SLAPP provisions – and the litigation privilege (at a
3 minimum).

4 The Movants now seek to recover the attorneys' fees associated with the Motion to
5 Strike.

6 DISCUSSION

7 Section 425.16 of the California Code of Civil Procedure provides a procedural
8 remedy to quickly dispose of actions against a party that are intended to "chill the valid
9 exercise of the constitutional rights of freedom of speech ..." C.C.P. § 425.16(a). The
10 defendant in such an action may file a special motion to strike the complaint. C.C.P.
11 § 425.16(b). Once the court determines that a cause of action arises from actions in
12 furtherance of a person's constitutional rights of petition or free speech in connection with a
13 public issue ("Protected Speech"), the Court must dismiss such a cause of action unless the
14 plaintiff establishes a probability that he will prevail on the cause of action. *Id.*

15 The statute expressly states that Protected Speech includes any written or oral
16 statement made in the course of a judicial proceeding or in connection with an issue under
17 consideration or review by a judicial body. C.C.P. § 425.16(e). Thus, litigation related
18 activity by another party's attorney may be Protected Speech and causes of action based on
19 this Protected Speech may be a SLAPP suit. *See e.g., Bleavins v. Demarest*, 196 Cal. App.
20 4th 1533 (2011).

21 A facial review of the Debtor's amended reply makes clear that Debtor asserted
22 claims exclusively based on Movant's representation of Neocell and exclusively based on
23 statements made to a court. Indeed, Debtor does not attempt to dispute this characterization
24 of the amended reply. As a result, based on a facial review of the amended reply that was
25 necessary and appropriate in connection with consideration of both the motion to dismiss
26 and the motion to strike, it was clear that the Court must grant the motion to strike unless
27 Debtor established a probability of success on the merits. C.C.P. § 425.16 (b). And under
28 subdivision (c) of section 425.16: "any SLAPP defendant who brings a successful motion to

1 strike is entitled to mandatory attorneys' fees." *Ketchum v. Moses*, 24 Cal.4th 1122, 1131
2 (2001).

3 The issue in granting an award of attorneys' fees in this case is whether the Court
4 may find that the Movants were successful on their motion to strike for purposes of
5 subsection (c) when the Court dismissed the action based on Plaintiff's lack of standing.
6

7 **A. California Courts Allow Fee Recovery Under Similar Facts.**

8 California courts repeatedly hold that dismissal of the underlying action, either
9 voluntarily or involuntarily, does not moot an award of attorneys' fees under section
10 425.16(c), if the motion to strike was filed prior to the dismissal. *See Chambers v. Miller*,
11 140 Cal. App. 4th 821, 826 (2006) ("a trial court may award attorney fees under the anti-
12 SLAPP statute where the challenged claims are dismissed after the motion was filed, but
13 before it has been heard"); *Pfeiffer Venice Properties v. Bernard*, 101 Cal. App. 4th 211,
14 218 (2002) (a defendant who is sued in violation of his free speech rights is entitled to an
15 award of attorneys' fees under C.C.P. § 425.16 even if the matter is dismissed sua sponte by
16 the trial court prior to consideration of the SLAPP motion); *S.B. Beach Properties v. Berti*,
17 39 Cal. 4th 374, 380 (2006) ("a voluntary dismissal ... does not deprive the trial court of
18 jurisdiction over collateral statutory rights, including the right to statutory costs and
19 attorneys['] fees...."); *Liu v. Moore*, 69 Cal. App. 4th 745, 750 -751 (1999). These decisions
20 reflect the conclusion that the failure to consider fee requests in such a circumstance:
21 "...works a nullification of an important provision of C.C.P. § 425.16." *Liu*, 69 Cal. App.
22 4th at 751. Thus, ruling in such a situation is a requirement. *Pfeiffer*, 101 Cal. App. 4th at
23 215.

24 In particular, under California law, the fact that the court dismissed the action based
25 on a lack of standing does not deprive the court of either the ability or the requirement to
26 determine and award fees. *Major v. Silna*, 134 Cal. App. 4th 1485, 1498 (2005); *Moraga-*
27 *Orinda Fire Protection Dist. v. Weir*, 115 Cal. App. 4th 477, 480-483 (2004). The award of
28 attorneys' fees under section 425.16, subsection (c) is entirely dependent upon a

1 determination of the merits of the motion to strike. *Pfeiffer*, 101 Cal. App. 4th at 218. A
2 ruling that a complaint is legally insufficient (without jurisdiction or standing), however, is a
3 ruling on the merits. *See Moraga-Orinda*, 115 Cal. App. 4th at 483.

4 California courts so rule because to deny fees to a party defending against a SLAPP
5 action when the plaintiff does not have a legal right to bring the complaint would be
6 contrary to the clearly stated policy of the SLAPP statute – to punish those filing actions
7 designed to "chill the valid exercise of the constitutional rights of freedom of speech." *See*
8 C.C.P. § 425.16(a). Requiring a court to have a hearing on the merits underlying a legally
9 insufficient complaint also would be contrary to the policy of the SLAPP statute, because it
10 would cause the parties to incur unnecessary attorneys' fees in relation to a dismissed action.

11
12 **B. The Federal Courts Will Entertain And Enforce A SLAPP Motion And Award**
13 **Fees In Connection Therewith.**

14 Federal courts can consider a special motion to strike causes of action based on
15 California law under C.C.P. § 425.16 and award fees in connection therewith. *Thomas v.*
16 *Fry's Electronic's, Inc.*, 400 F.3d 1206 (9th Cir. 2005); *United States v. Lockheed Missiles &*
17 *Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999); *Restaino v. Bah (In re Bah)*, 321 B.R. 41, 45-
18 47 (9th Cir. BAP 2005). In doing so, however, they must act with caution to avoid a
19 collision between the anti-SLAPP statute and the Federal Rules of Civil Procedure. *Verizon*
20 *Delaware, Inc. v. Covad Communications Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004). The
21 *Lockheed* court found that the provisions of Civil Rules 8, 12, and 56 can coexist with the
22 anti-SLAPP statute. 190 F.3d at 972. But, conflicts occasionally necessitate a refusal to
23 apply an anti-SLAPP statute provision. *See Verizon*, 377 F.2d at 1091 (leave to amend
24 required prior to imposition of anti-SLAPP attorneys' fee provisions in order to avoid
25 conflict with Civil Rule 15(a)'s policy favoring liberal amendment); *Metabolife Int'l, Inc. v.*
26 *Wornick*, 264 F.3d 832, 845-846 (9th Cir. 2001) (discovery limiting provisions of the anti-
27 SLAPP statute not enforceable in federal court as they conflict with Civil Rule 56.)

1 Here no such conflict exists. Amendment would be futile – all claims implicate the
2 anti-SLAPP statute. And in recognition of this fact, Debtor requested neither leave to
3 amend nor discovery. Indeed, Debtor did not file any timely opposition to the anti-SLAPP
4 motion to strike.

5
6 **C. *Brown v. Electronic Arts, Inc.* Does Not Require A Different Result.**

7 The Debtor's argument that fees should not be awarded relies on *Brown v. Electronic*
8 *Arts, Inc.* and the assertion that the *Brown* court held that when a case is dismissed due to a
9 technical issue, such as a lack of standing, the defendant asserting the motion to strike is not
10 entitled to attorneys' fees. *See* 722 F.Supp.2d 1148, 1155 (C.D. Cal. 2010). While the
11 *Brown* argument is initially appealing, closer analysis identifies significant factual and legal
12 distinctions between *Brown* and this case.

13 In *Brown*, the defendant first concurrently filed a 12(b)(6) motion and a C.C.P.
14 § 425.16 motion to strike. *Id.* at 1151. The plaintiff failed to oppose these motions, and the
15 court granted the motion to dismiss, albeit with leave to amend. *Id.* After the plaintiff filed
16 an amended complaint, the defendant renewed its motions. *Id.* The court dismissed
17 Lanham Act Claims pursuant to the motion to dismiss, thereafter, declined to exercise its
18 supplemental jurisdiction over the state law causes of action, and, as a result, declined to
19 rule on the motion to strike. *Id.*

20 The defendant thereafter filed a motion seeking attorneys' fees under the Lanham Act
21 and in connection with its initial motion to strike under C.C.P. § 425.16(a). *Id.* The court
22 considered the Lanham Act request on the merits and declined to award fees under the
23 federal statute. *Id.* at 1152-1155. In relation to the C.C.P. § 425.16(a) fees, the Court also
24 declined the fee request. As to the initial anti-SLAPP motion, the court determined that the
25 defendant was not a prevailing party within the meaning of the statute where the matter was
26 not finally decided in defendant's favor as the court granted leave to amend. *Id.* at 1155-
27 1156. As to the second anti-SLAPP motion, the defendant did not make a fee request. *Id.* at
28 1157. The court in *dicta* expressly stated that it did not reach the merits as to the second

1 anti-SLAPP motion as it declined to exercise jurisdiction over the dispute after its decision
2 to dismiss the Lanham claims with prejudice. *Id.* Again, however, the Court did not finally
3 decide any issue in connection with the state court claims as it granted leave to amend in
4 relation to the first motions and declined jurisdiction before the defendant filed a motion
5 seeking C.C.P. § 425.16 fees in relation to the second motion.

6 The Debtor's attempt to turn the *Brown* court's decision into a ruling that any
7 technical dismissal precludes a consideration of the appropriateness of a C.C.P. § 425.16
8 attorneys' fee award, thus, is based on *dicta* at best and on a misreading of the case at worst.

9 Here, the Movants expressly request fee recovery on a final decision where the Court
10 granted dismissal without leave. The defendants in *Brown* requested fees only in connection
11 with a motion to strike where the Court granted leave to amend. In this case, the Court has
12 jurisdiction delegated from the district court to decide the fee issue. In *Brown*, the court
13 refused to exercise supplemental jurisdiction over the dispute once it disposed of the claims
14 based on Federal law. In *Brown*, the plaintiff opposed the second anti-SLAPP motion.
15 Here, the Debtor did not even attempt to defend either the anti-SLAPP motion or the motion
16 to dismiss and, in effect, conceded both his lack of standing to bring the claims and the lack
17 of merit in any defense to the anti-SLAPP motion.

18 *Brown* provides neither direction nor aid to this Court. It is factually distinguishable.
19 Thus, it fails to suggest that this Court deviate from the California case law that mandates
20 fee recovery here.

21
22 **D. Under California Law A Decision Based On A Lack Of Standing Is A Decision On**
23 **The Merits For Purposes Of C.C.P. § 425.16(c) And The Result Should Be No**
24 **Different In A Federal Court.**

25 In general, a decision to dismiss on a technical ground, such as a lack of standing, is
26 not a decision on the underlying merits and precludes further consideration of the merits.
27 This general rule, however, does not preclude an award of fees here. If a cause of action
28 based on California laws involves Protected Speech, the party asserting the cause of action

1 must establish a probability of final success in connection therewith or the court must
2 dismiss the cause of action. If the case is subject to dismissal for a lack of standing, the
3 court need look no further into the matter. The chance of final success is not improbable – it
4 is zero. Thus, the statutory basis for an award of fees is met. The suggestion that the Court
5 cannot look further after determining that the claimant lacked standing to assert a SLAPP
6 action misses the point; the Court need look no further. A determination that success is
7 impossible because the Debtor lacked standing is a decision on the merits of an anti-SLAPP
8 motion within the meaning of the C.C.P. § 425.16.

9
10 **E. The Fees Appear Reasonable And Are Appropriate For Collection.**


11 Finally, the requested fees appear reasonable in amount for a motion of this type and
12 the fee request on behalf of the individual Movants is supported by declaratory evidence.
13 Again, there is no objection to the quantum of the requested fees. And Debtor concedes that
14 there is no bar to recovery of fees given that Debtor sued three members of the firm as well
15 as the firm itself. The individual attorney defendants represented by other attorneys at the
16 same law firm are entitled to an attorney fees award. *See Witte v. Kaufman*, 141 Cal. App.
17 4th 1201, 1211 (2006).

18
19 **CONCLUSION**

20 The Movants are awarded attorneys' fees; this Court ruled on the merits of the
21 complaint within the meaning of the anti-SLAPP statute when it dismissed the Debtor's
22 complaint as legally insufficient based on a lack of standing. The dismissal does not moot
23 the award of attorneys' fees because the C.C.P. § 425.16 motion to strike was filed prior to
24 the dismissal. The Movants are to submit an updated accounting of attorneys' fees incurred
25 in litigating their motion to strike, including the litigation of the issue of attorneys'
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1 fees, within 14 days. The Debtor must file any opposition to the quantum of fees within
2 14 days thereafter and obtain a hearing date in connection therewith. If Debtor does not file
3 timely opposition, the Movants may submit their fee award order.

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5 DATED: May 16, 2012


LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court